

AN ORDINANCE

2006-06-01-0643

**AUTHORIZING A LICENSE TO HEI SAN ANTONIO HOTEL, L.P. FOR CONTINUED USE OF TWO PEDESTRIAN TUNNELS, ONE UNDER SOLEDAD STREET BETWEEN THE CROWNE PLAZA HOTEL AND THE BROADWAY NATIONAL BANK, AND THE OTHER UNDER MARTIN STREET BETWEEN THE BANK AND ITS PARKING GARAGE, IN NCBS 139 AND 140, IN DISTRICT 1, FOR A 10 YEAR TERM FOR A \$30,671 FEE, THE TRANSACTION CONTINGENT ON THE CLOSING OF THE SALE OF THE CROWNE PLAZA HOTEL.**

\* \* \* \* \*

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:**

**SECTION 1.** The City Council authorizes and directs granting a license to encroach on public right of way in District 1, for a 10-year term and a \$30,671 fee. In furtherance of the preceding, the City Council authorizes and directs the City Manager or her designee to execute and deliver on behalf of the City a License Agreement substantially in the form attached as **Attachment I**, which is incorporated into this ordinance by reference for all purposes as if it were fully set forth. The City Manager and her designee should take all other actions reasonably necessary or convenient to effectuate the transaction described in Attachment I, including agreeing to nonmaterial changes to its terms.

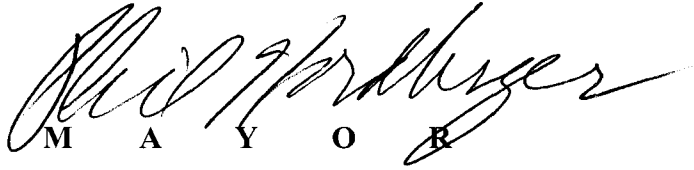
**SECTION 2.** The authorization and direction of the preceding paragraph is contingent on HEI San Antonio Hotel, L.P.; or another entity directly or indirectly controlling, controlled by, or under common control with HEI San Antonio Hotel, L.P. acquiring ownership of the Crowne Plaza hotel. The license agreement may be with the entity acquiring the hotel if the entity controls, is controlled by, or is under common control with HEI San Antonio Hotel, L.P.

**SECTION 3.** Funds generated by this ordinance are to be deposited into Fund 11001000, General Fund, Internal Order 224000000002, LICENSE AGREEMENTS IN ROW, General Ledger 4202410, License Agreements - Use of ROW, when received.

**SECTION 4.** The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director of Finance may, subject to concurrence by the City Manager, or the City Manager's designee, correct allocation to specific SAP Fund Numbers, SAP Project Definitions, SAP WBS Elements, SAP Internal Orders, SAP Fund Centers, SAP Cost Centers, SAP Functional Areas, SAP Funds Reservation Document Numbers, and SAP GL Accounts as necessary to carry out the purpose of this Ordinance.

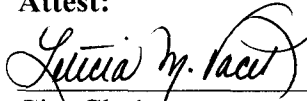
**SECTION 5.** This ordinance becomes effective June 11, 2006.

**PASSED AND APPROVED** this 1<sup>st</sup> day of June 2006.

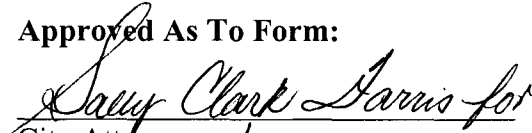
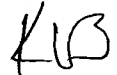
  
M A Y O R

**PHIL HARDBERGER**

**Attest:**

  
\_\_\_\_\_  
City Clerk

**Approved As To Form:**

  
\_\_\_\_\_  
City Attorney 

## Attachment I

# License Agreement

(Crowne Plaza)

This License Agreement (License) is entered into between Licensee and the City of San Antonio (Licensor) under the authority of the Authorizing Ordinance.

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### 1. Pertinent Information.

#### Authorizing Ordinance:

**Project No.** 898

**Licensee:** HEI San Antonio Hotel, LP

**Licensee's Address:** 101 Merritt 7, 1<sup>st</sup> Floor, Norwalk, Connecticut 06851

**Term:** 10 years

**Fee:** \$30,671

**Premises:** The portions of the public right of way of Soledad and Martin Streets, San Antonio, Bexar County, Texas (NCB's 139 & 140), encroached on by Licensee within the Scope of the License. Pictures depicting the affected area are at **Exhibit A**.

**Scope of License:** Use, maintenance, and operation of two existing pedestrian tunnels between the Crowne Plaza Hotel at 111 E. Pecan and the Broadway National Bank and its garage at 425 Soledad.

**Effective Date:** The effective date of the Authorizing Ordinance

**Licensor's Address:** City Clerk, City of San Antonio, P.O. Box 839966/2nd Floor, City Hall, San Antonio, Texas 78283-3966

## **2. Grant of License.**

Licensor grants Licensee a license (License) to use, maintain, and operate the Premises within the Scope of the License. This License is limited to the stated Term and is conditioned on Licensee's payment of the Fee. This license does not relieve Licensee of any other approvals, permits, or licenses that may otherwise be required including but not limited to right-of-way management permits.

## **3. Restrictions on Use/Recording.**

**3.01.** This License does not grant Licensee authority to use any public rights-of-way beyond the Premises.

**3.02.** This License grants only a privilege, not a real property interest. Licensor may enter the Premises at any time to assert its real property interest or for other purposes not interfering unreasonably with the Scope of License.

**3.03.** A Memorandum of License Agreement in form satisfactory to Licensor will be recorded by Licensor in the Official Public Records of Real Property of Bexar County, Texas. Licensee must pay the recording fees.

## **4. License Fee.**

Licensee must pay the Fee in a one-time lump sum, on or before the Effective Date. The Fee must be paid at the Department of Asset Management, 114 W. Commerce St., 2nd Floor (c/o Property Disposition Manager), San Antonio, Texas 78205.

## **5. Construction, Maintenance, and Operations.**

**5.01. Costs.** Licensee is solely responsible for all costs of construction, installation, repairs, maintenance, operation, and the like of any property placed on the Premises.

**5.02. No Liability.** Licensor assumes neither liability nor expense under this License. Licensor is not liable to Licensee or otherwise for damage to the Premises arising from or related to activities of Licensor in the vicinity.

**5.03. Relocation.** If Licensor's needs require relocation, maintenance, or adjustment in the Premises or improvements by Licensee thereto, the relocation, maintenance, or adjustments will be at Licensee's sole cost and expense.

**5.04. Maintenance.** Licensee, at its sole cost and expense, must maintain all improvements it constructs or installs on the Premises. In so doing, Licensee must adhere to all applicable safety standards and must adhere to all applicable federal, state, or local laws, rules, or regulations.

**5.05. No Power to Bind.** Licensee cannot bind or permit another to bind Licensor for payment of money or for any other obligation.

**5.06. Contractors and Subcontractors.** Licensee must promptly pay anyone performing work on behalf of Licensee who could file a mechanics' or materialmen's lien on the Premises. If any such lien is filed, Licensor may treat it as an event of default and terminate this License by delivering 45 days prior written notice to Licensee. But if the lien is removed or released of record within the notice period, this License remains in effect. Licensee remains obligated to clear the lien without cost to Licensor even after termination.

**6. Indemnity.**

**6.01. Licensee must indemnify Licensor and its elected officials, employees, agents, and representatives of and from any all loss, cost, liability, or expense, including court costs and attorneys fees, arising from or relating to (a) the grant of this License, (b) Licensee's activities under this License, (c) or Licensee's activities or presence on or about the Premises, whether or not authorized by this License.**

**6.02. Nothing in this License waives governmental immunity or other defenses of Licensor under Texas law.**

**6.03. This indemnity expressly covers the consequences of indemnitees' own negligence.**

**6.04. Licensee must promptly advise Licensor in writing of any claim subject to this indemnity and must, at its own cost, investigate and defend such claim. Despite any insurance policy, Licensor may, at its own expense, participate in the defense without relieving Licensee of this indemnity.**

**7. Insurance.**

**7.01. Without limiting Licensor's rights to indemnity, Licensee must provide and maintain insurance, at its own expense, with companies admitted to do business in the State of Texas and with a rating of A- or better by A. M. Best and Company or provide evidence of self-insurance, in the following types and amounts:**

<b>Type</b>	<b>Amount</b>
1. Worker's Compensation during the performance of improvements to the Premises or an approved alternate plan at other periods during the Term.	Statutory, with a waiver of subrogation in favor of Licensor
2. Employers' Liability during improvements to the Premises or an approved alternate plan at other periods during the Term.	\$500,000 per category, with a waiver of subrogation in favor of Licensor

- |   |   |
|---|---|
| <p>3. Commercial General (Public) Liability – to include coverage for the following where the exposure exists:</p> <ul style="list-style-type: none"><li>(a) Premises/Operations</li><li>(b) Independent Contractors</li><li>(c) Products/Completed</li><li>(d) Personal Injury Liability</li><li>(e) Contractual Liability</li><li>(f) Explosion, Collapse and Underground Property</li><li>(g) Broad Form Property Damage</li></ul> | <p>For Bodily Injury and Property Damage: \$1,000,000 per Occurrence, \$2,000,000 general aggregate or its equivalent in Umbrella or Excess Liability coverage.</p> |
| <p>4. Property Insurance -- for physical damage to the property of Licensee including improvements and betterments to the Premises.</p>   | <p>Coverage for a minimum of 80% of the actual cash value of the improvements.</p>  |

Any substitute for Workers' Compensation and Employer's Liability must be approved in advance by Licensor's Risk Manager.

**7.02.** Licensor's Risk Manager may reasonably modify the above requirements if he determines the modification is in the Licensor's best interest. If Licensee believes the requested change is unreasonable, Licensee has 60 days to give notice of termination. The termination provisions then apply.

**7.03.** With respect to the above required insurance, each insurance policy required by this License must contain the following clauses:

“No insurance or self-insurance provided by Licensee can be canceled, limited in scope or coverage, or non-renewed until after 30 days' prior written notice has been given to:

Department of Asset Management  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966  
Attention: Director”

“Any insurance or self-insurance provided by Licensee is primary to any insurance or self-insurance maintained by the City of San Antonio.”

“Any insurance or self-insurance maintained by the City of San Antonio applies in excess of, not in contribution with, insurance provided by this policy.”

**7.04.** Each insurance policy required by this License, excepting policies for Workers' Compensation, Employer's Liability and Professional Liability, must contain the following clause:

“The City of San Antonio, its elected officials, employees, agents, and representatives are added as additional insureds.”

**7.05.** Licensee must deliver to Licensor, within 30 days after the Effective Date, endorsements to the above-required policies adding the applicable clauses referenced above. Such endorsements must be signed by an authorized representative of the insurance company

and show the signatory's company affiliation and title. Licensee must deliver to Licensors documentation acceptable to Licensors confirming the authority of those signing the endorsements.

**7.06.** The Notices and Certificates of Insurance must be provided to the same address as for notices of cancellation.

**7.07.** This License does not limit Licensee's liability arising out of or related to the Premises or Licensee's activities thereon.

**7.08.** Licensee waives all claims against Licensors for injury to persons or property on or about the Premises, whether or not caused by Licensors' negligence.

## **8. Termination.**

**8.01.** Licensors may terminate this License at any time before expiration by giving Licensee 30 days' written notice.

**8.02.** Upon expiration or termination, all rights and privileges immediately cease, and Licensee must immediately cease use of the Premises. Licensors may direct Licensee to either (a) abandon the encroaching improvements and appurtenances, including lines and equipment; or (b) remove all or any part of them and restore the Premises, at Licensee's sole cost, to original condition. Improvements or appurtenances not removed within 90 days after termination, whether by expiration or otherwise, become the property of Licensors. Licensors may, without liability to Licensee, dispose of such property at a public or private sale, without notice to Licensee. Licensee is liable for Licensors' costs incurred in connection with Licensee's property.

## **9. Assignment/Sublicensing.**

This License cannot be assigned or sublicensed, other than to Licensee's parent or subsidiaries. Licensee must give Licensors 30 days' written notice before such an assignment or sublicense. Licensee cannot lease or sublease the Premises.

## **10. Condemnation.**

If the Premises are taken, in whole or in part, by eminent domain, Licensors may terminate this License as of the date title to the taken land vests in the condemning authority. Licensee waives any claim to condemnation proceeds paid to Licensors. Licensee may seek a separate condemnation award.

## **11. Attorney's Fees and Court Costs.**

In any action in which Licensee is found to have materially defaulted hereunder, Licensors can recover from Licensee its reasonable attorney's fees.

## **12. Taxes and Licenses.**

Licensee must pay, on or before the due date all federal, state, and local taxes, license fees, permit fees, and similar charges now or hereafter levied on Licensee or its property or on the Premises and arising from Licensee's use thereof.

## **13. Prohibited Interests in Contracts.**

**13.01.** The Charter of the City of San Antonio and its Ethics Code prohibit a City officer or employee, as defined in Section 2-52 of the Ethics Code, from having a financial interest in any contract with the City or any City agency such as city owned utilities. An officer or employee has a "prohibited financial interest" in a contract with the City or in the sale to the City of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale:

- (a) a City officer or employee;
- (b) his parent, child or spouse;
- (c) a business entity in which the officer or employee, or his parent, child or spouse owns (i) 10% or more of the voting stock or shares of the business entity, or (ii) 10% or more of the fair market value of the business entity;
- (d) a business entity in which any individual or entity above listed is a (i) subcontractor on a City contract, (ii) a partner, or (iii) a parent or subsidiary business entity.

**13.02.** Licensee warrants and certifies as follows:

- (a) Licensee and its officers, employees and agents are neither officers nor employees of the City.
- (b) Licensee has tendered to the City a Discretionary Contracts Disclosure Statement in compliance with the City's Ethics Code.

**13.03.** Licensee acknowledges that City's reliance on the above warranties and certifications is reasonable.

#### **14. Licensee Financing.**

Licensee may encumber Licensee's personal property on the Premises, and any lien of Licensor (whether by statute or under this License) is subordinate to the financing lien. Licensor will acknowledge this subordination in writing, if the proffered documents do not modify the rights and obligations of this License. The City Manager or a designee may execute such documents, without a further ordinance. But if the documents modify the License, then a specific ordinance is required.

#### **15. Lien for License Fee, Taxes, Fees and Other Charges.**

Licensee grants Licensor a security interest in Licensee's property on the Premises. The security interest secures payment of the Fee and all taxes, fees, and other charges owing because of Licensee's use under this License. Licensee may dispose of the property free of the security interest in the ordinary course of business. At Licensor's request, Licensee must execute a financing statement.

#### **16. Consent/Approval of Licensor.**

Licensor's consent and approval may be granted by the Director of Asset Management, unless the City Charter requires Council action.



## **17. Miscellaneous Provisions**

**17.01. Relationship Limited.** This instrument creates only the relationship of Licensor and Licensee. The parties are not principal and agent, partners, joint venturers, or participants in any other enterprise between them.

**17.02. Nondiscrimination.** Licensee must not discriminate against any individual or group on account of race, color, gender, age, religion, national origin, or handicap, in employment practices or in the use of the Premises.

**17.03. Release From Liability.** If Licensor transfers the Premises, Licensor will have no liability relating to the period after transfer. Licensor's transferee will succeed to all Licensor's rights hereunder.

**17.04. Yielding Up.** Licensee must, at termination, whether by expiration or otherwise, yield the Premises up peacefully, including any improvements and fixtures (other than trade fixtures).

**17.05. Authority to Execute.** The party or parties executing this License on behalf of Licensee personally warrant that each of them has full authority to do so.

**17.06. Acknowledgment of Reading.** The parties acknowledge reading this License, including exhibits or attachments, and have received the advice and counsel necessary to form a complete understanding of their rights and obligations. Having so done, they execute this License freely and voluntarily.

**17.07. Applicable Law. The Construction Of This License And The Rights, Remedies, And Obligations Arising Thereunder Are Governed By The Laws Of The State Of Texas.** But the Texas conflicts of law rules must not cause the application of the laws of a jurisdiction other than Texas. The obligations of both parties are performable in San Antonio, Bexar County, Texas.

**17.08. Severability.** If any portion hereof is determined to be invalid or unenforceable, the determination does not affect the remainder hereof.

**17.09. Successors.** This License inures to the benefit of and binds the heirs, representatives, successors, and permitted assigns of each party. This clause does not authorize any assignment not otherwise authorized.

**17.10. Integration. This Written License Represents The Final Agreement Between The Parties And May Not Be Contradicted By Evidence Of Prior, Contemporaneous, Or Subsequent Oral Agreements Of The Parties. There Are No Oral Agreements Between The Parties.**

**17.11. Modification.** This License may not be changed orally but only by a written agreement, signed by the party against whom enforcement of any modification is sought. No such modification, express or implied, affects the right of the modifying party to require observance of either (i) any other term or (ii) the same term or condition as it applies on a subsequent or previous occasion.

**17.12. Third Party Beneficiaries.** This License is intended for the benefit of the parties hereto and their successors and permitted assigns only. There are no third party beneficiaries.

**17.13. Notices.** Notices must be in writing and by certified mail, return receipt requested. Notice is complete three days after deposit, properly addressed and postage prepaid, with the United States Postal Service. Failure to use certified mail does not defeat the effectiveness of notice actually received, but such notice is effective only on actual receipt. Address for notice may be changed by giving notice. Unless changed, notice to Licensee goes to Licensee's address specified at the beginning, and notice to Licensor goes to:

City Clerk		Director, Asset Management
City of San Antonio		Department
P.O. Box 839966	With a copy	City of San Antonio
San Antonio, Texas 78283-3966	to	P.O. Box 839966
		San Antonio, Texas 78283-3966

**17.14. Pronouns.** In construing this License, plural constructions include the singular, and singular constructions include the plural. No significance attaches to whether a pronoun is masculine, feminine, or neuter. The words "herein," "hereof," and other, similar compounds of the word "here" refer to this entire License, not to any particular provision of it.

**17.15. Captions.** Paragraph captions in this License are for ease of reference only and do not affect the interpretation hereof.

**17.16. Counterparts.** This License may be executed in multiple counterparts, each of which is an original, whether or not all parties sign the same document. Regardless of the number of counterparts, they constitute only one agreement. In making proof of this License, one need not produce or account for more counterparts than necessary to show execution by or on behalf of all parties.

**17.17. Further Assurances.** The parties must execute and deliver such additional documents and instruments as may be required to effect fully the provisions hereof. But no such additional document(s) may alter the rights or obligations of the parties under this License

**17.18. Ambiguities Not to Be Construed Against Drafter.** Ambiguities in this License must be resolved without constructing against the drafter.

In Witness Whereof, the parties have hereunto caused their representatives to set their hands.

**Licensor:**

**City of San Antonio,**  
a Texas municipal corporation

By: \_\_\_\_\_

Printed  
Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**Licensee:**

**HEI San Antonio Hotel, LP,** a  
Delaware limited partnership, by and  
through its sole general partner

**HEI San Antonio GP, LLC,** a  
Delaware limited liability company

By: \_\_\_\_\_

Printed  
Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

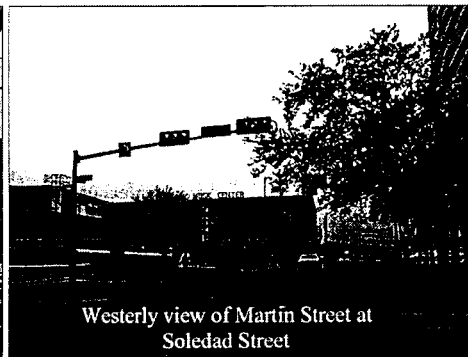
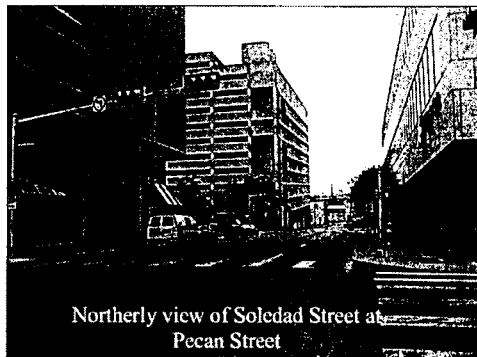
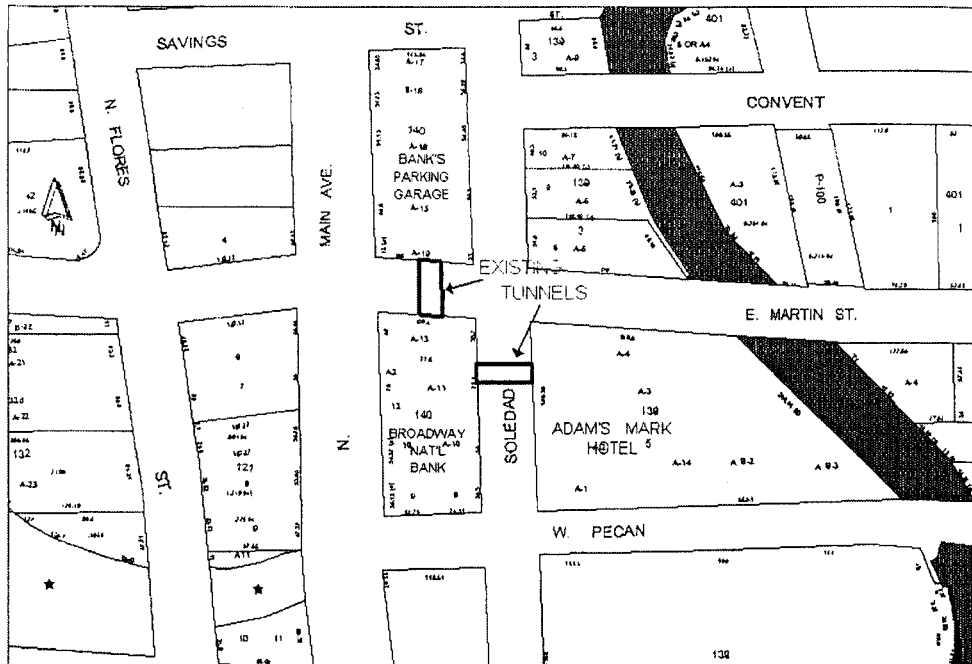
**Attest:**

\_\_\_\_\_  
City Clerk

**Approved As To Form:**

\_\_\_\_\_  
City Attorney

## Exhibit A



### EXHIBIT "A"

S. P. No. 898

Petitioner: MSPA Acquisition II, L.P.

Note 1: The bottom left picture labeled "northerly view" is from the perspective of the intersection of Soledad and Pecan, looking north up Soledad Street.

Note 2: The bottom right picture labeled "westerly view" is from the perspective of the intersection of Soledad and Martin, looking west down Martin Street.